

Summary of Answers to the Essay Part of February 2010 Virginia Bar Exam
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After each bar exam, the Virginia Board of Bar Examiners invites representatives from each of the law schools in Virginia to meet with the Board for a review and discussion of the range of answers the Board will accept for each essay question. As a result of these discussions, the Board will often expand the scope of what is an acceptable answer.

Please remember what follows is just a summary, which includes some "filling in" based on the general information the Board furnished. jrj

1. **[UCC - Sales]** On March 1, 2009, Tice's Variety Store ("Tice's") in Russell County, Virginia, mailed a purchase order on Tice's standard form to Motor Car Wax Company ("MCW") in Suffolk, Virginia, for 2,000 cans of its premium car wax for a price of \$3.00 per can of wax. This car wax was developed and promoted by MCW for use on the latest model cars with the best exterior finish available. On the reverse side of Tice's order form were 13 printed conditions, one of which stated, "Tice's may reject any defective goods within 30 days of delivery." The entire form was printed on one piece of paper, front and back, using the same style, color, and size of type. MCW received and processed Tice's order and, on March 5, 2009, sent Tice's an order confirmation on MCW's standard form that also contained a number of printed conditions, one of which stated: "Any objections to the quality of goods shipped must be made in writing within ten days of receipt of the goods." Another of the printed conditions stated: "MCW gives no warranties of any nature, either express or implied." Like Tice's purchase order, MCW's entire form was printed on one piece of paper, front and back, using the same style, color, and size of type. Tice's regularly did business with MCW and had received MCW's standard confirmation form with each transaction.

Tice's received and paid for the shipment of wax from MCW on April 1, 2009, and began displaying the wax in its stores on the same day. Tice's sold 200 cans the first day. Three days later, Tice's received several complaints that the wax had discolored the paint on its customers' cars. After some investigation, Tice's determined that the wax was not suitable for use on newer cars and, on April 15, 2009, sent an e-mail notifying MCW that Tice's rejected the entire order as being defective and returned the remaining wax to MCW. MCW refused to accept the return, asserting that the terms of the agreement required Tice to reject the goods within ten days of receipt.

Tice's then filed suit in the Circuit Court of the City of Richmond and served MCW's registered agent whose office and residence were in Richmond. Tice's sought judgment for \$6,000 with interest from April 1, 2009, alleging that the product was unfit for the purpose for which it was designed and that it was not merchantable. Tice's also prayed for an award of attorney's fees although neither Tice's order form nor MCW's confirmation form mentioned anything about recovery of attorney's fees in the event of a dispute. MCW answered and asserted the following affirmative defenses:

- (i) that Tice's failed to reject the goods on the terms required by their contract and
- (ii) that MCW had disclaimed all warranties.

(a) How should the court rule on each of MCW's affirmative defenses? Explain fully.

- [i] Cans of car wax are goods (UCC 8.2-105); thus, the answer to this question is governed by Article 2 of the Uniform Commercial Code. UCC 8.2-102. Tice's order form is an offer; MCW's confirmation, while not mirroring Tice's order/offer, will nonetheless be treated as an acceptance. UCC 8.2-207(1). Both Tice and MCW are merchants (UCC 8.2-104) so any *additional* terms in MCW's confirmation will be treated as proposals for additions to the contract. UCC 8.2-207(2). Conversely, any terms in MCW's confirmation that *differ* from terms in Tice's order form will lead a court to "knock-out" the conflicting terms in both documents and substitute any relevant UCC Art. 2 "gap-filling" terms in their place.
- [ii] Disclaimer of Warranties. MCW's confirmation has one additional term that could have become part of the contract: "MCW gives no warranties of any nature, either express or implied." However, this term is legally ineffective to disclaim the implied warranty of merchantability because it does not include the required word "merchantability" and is not "conspicuous," both of which are required by UCC 8.2-316(2). Similarly, the language would be ineffective to disclaim any implied warranty of fitness for a particular

purpose. MCW can argue that term is the functional equivalent of an “as is” clause, which is authorized by UCC 8.2-316(3)(a). Thus, MCW impliedly warranted the merchantability of its car wax.

(b) If Tice’s were to prevail in its suit, should the court award Tice’s its attorney’s fee? Explain fully.

Virginia still adheres to the “American Rule” which provides that each party pays its own attorney’s fees unless otherwise provided by contract or statute. There is neither a contractual provision nor a section of Article 2 that would permit Tice to recover attorney’s fees.

2. [Wills & Trusts] Greg Settlor of Farmville, Virginia died in January 2009. By will, he devised his entire estate to a trust established for the benefit of his nephew, Ronnie, age 40. Ronnie was a former nightclub owner, whom everyone knew as a philanderer. He spent most of his time betting on horses and sporting events, and as a result of his lifestyle, had numerous creditors and three ex wives. While he often helped Ronnie financially, Settlor had always told him he would not support his decadent lifestyle.

In his will, which was probated in the Circuit Court of Prince Edward County, Virginia, Settlor named his brothers Ken and Frank, as co-trustees (“Trustees”). The trust instrument stated that Settlor “. . . has great concern about Ronnie’s lifestyle, and, for that reason, the Trustees shall pay the income from the trust to Ronnie each month for his support and maintenance, and annually only so much of the corpus as the Trustees and Ronnie mutually deem necessary and proper.”

The majority of Settlor’s estate consisted of commercial rental property in Prince Edward County and \$300,000 in cash. Ken and Frank entered into a written agreement with a local real estate firm to manage the trust’s rental properties for a monthly fee and signed the agreement “Ken and Frank, as Trustees.”

Soon after becoming a Trustee, Frank’s janitorial business began having financial difficulties. Frank started withdrawing funds from the trust to cover his business and some personal expenses. Later that same year, Frank lost his business and all of his assets to his creditors. Ken knew of Frank’s actions but did not personally benefit from them.

After learning about the trust, one of Ronnie’s creditors obtained a valid judgment against Ronnie for \$200,000 and initiated a garnishment proceeding in the appropriate court against the Trustees and Ronnie to recover the amount of the judgment from the trust assets.

While discussing the garnishment with his attorney, Ronnie discovered that the Trustees had never paid the real estate firm under the property management agreement and that the firm had filed an action against Ken and Frank, individually and as Trustees, to recover the fees owed. After confronting Ken and Frank about the real estate firm’s claim, Ronnie also learned that Frank had misappropriated some of the trust funds.

Ronnie’s attorney filed a complaint in the Circuit Court of Prince Edward County against Ken and Frank, alleging breach of fiduciary duty and seeking an accounting and recovery of the misappropriated funds. In light of his insolvency, Frank did not offer any defense. Ken, on the other hand, contested any liability on his part and alternatively argued that, if found liable, he would have to account for only half of the misappropriated funds.

(a) Can Ronnie’s creditor reach the trust assets to satisfy its judgment against Ronnie? Explain fully.

Va. Code § 55-545.01 states:

“To the extent a beneficiary’s interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.”

The creditor probably can reach Ronnie’s income interest if it does not contain a spendthrift provision, which is “a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary’s interest.” Va. Code § 55-541.03. Spendthrift provisions are common in practice, but one is not mentioned in the problem.

Ronnie’s interest in the trust corpus should, however, be safe from creditors. Under Va. Code § 55-545.04(B), “a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion.

(b) Is Ken liable to Ronnie for any part of the funds misappropriated by Frank? Explain fully.

Yes, Ken had a duty to prevent and redress Frank's breach of trust. Even though he did not participate directly in Frank's breach, Ken is nevertheless liable. See Va. Code § 55-547.03(F) & (G).

(c) Are Ken and Frank individually liable to the real estate firm for the unpaid management fees? Explain fully.

No, Ken and Frank clearly signed the contract in their fiduciary capacity. So, they are not personally liable for the unpaid fees. See Va. Code § 55-550.10(A).

(d) May the real estate firm recover the unpaid management fees from the trust assets? Explain fully.

Yes, Ken and Frank can contractually bind the trust in contract. The firm can recover unpaid fees from trust assets, even though Ken and Frank are not personally liable. See Va. Code § 55-550.10(C).

3. [Va. Criminal Procedure] Fred, a wealthy resident of Lebanon, Virginia, who had a long history of emotional problems and who until recently had been receiving inpatient psychiatric treatment, was a spectator at a fire on Main Street. Tim, a cameraman for WLTW, the local television station, was covering the fire when Fred accosted him.

By coincidence, Fred had at his home a camcorder similar to the one Tim was using. Under the delusional belief that the camcorder belonged to him, Fred grabbed the camcorder and hollered, "That's my camcorder! You don't have any right to take pictures with it!" In fact, the camcorder, valued at \$5,000, was the property of WLTW.

Fred ran off with the camcorder, pursued by Tim. About a block away, Tim caught up with Fred. In the scuffle in which Tim was attempting to wrest the camcorder away from Fred, Fred tripped over the curb, hit his head as he fell, and suffered a fractured skull. Also, in the course of the scuffle, the camcorder fell to the concrete sidewalk and was smashed beyond repair.

After a period of hospitalization, Fred recovered. He was charged with grand larceny of the camcorder. At the same time, Tim was charged with assault and battery against Fred.

Concurrently, Fred filed a civil action for damages against Tim and WLTW alleging that Tim's battery was the proximate cause of his injuries and that WLTW was vicariously liable. WLTW cross-complained against Fred for the value of the camcorder.

Fred's attorney advises him that he should consider two possible pleas to the larceny charge: not guilty by reason of insanity or an "Alford" plea.

Tim's attorney advises him that he should plead not guilty to the battery charges and that he should assert the defenses of self-defense and defense of property.

(a) Regarding the criminal case against Fred, (i) is the insanity plea likely to succeed, and (ii) what is an "Alford" plea and what advantage, if any, would it have for Fred in these circumstances? Explain fully.

[i] The BBE wanted the applicant to note that Virginia follows the McNaughten rule as to the test for insanity & discuss the facts that were relevant to Fred's sanity at the time of the offense and would accept either conclusion. Discussion should include [1] Fred had just been released from inpatient psychiatric treatment; [ii] had a delusional belief; and the oddity of his conduct.

[ii] An Alford plea permits a defendant to consent to a conviction by pleading guilty, but not admitting that he in fact committed the offense. The advantage to Fred would be that such plea, without an acknowledgment that he in fact did it could not be used as an admission by him in the civil litigation. The disadvantages are that an Alford plea is treated the same as a guilty plea in being treated as a waiver of all of the constitutional rights attached to a criminal trial, waives the right to appeal and waives any objections to the admissibility of evidence.

(b) Regarding the criminal case against Tim, are the defenses of (i) self-defense and/or (ii) defense of property likely to succeed? Explain fully.

- [i] Since Tim ran after Fred and the physical contact occurred after Tim caught up with Fred, he can not successfully plead self defense.
- [ii] Applicant should discuss the right to use physical force to defend one's property. The rule is, as stated in *Commonwealth v. Alexander* 260 Va. 238 [2000] is: "When it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it must be noted that this rule is subject to the modification that he shall not, except in extreme cases, endanger human life or do great bodily harm.... Answer should recognize the limitations on use of physical force to defend property. The BBE were looking for a good discussion.

(c) In the civil case, can WLTV be held liable if it is found that Tim committed battery against Fred and that the battery caused Fred's injuries? Explain fully.

The BBE thought that WLTV was liable for the tort[s] of its employee, Tim. All the action was done in pursuit of recovering the employer's property, Tim was on the scene, filming, as part of his job and the BBE thought that the rule of vicarious liability applied as to both negligent and intentional torts, done in pursuit of the employer's interest.

4. [Federal Civil Procedure & Va. Civil Procedure] Olly Owner is a resident of Norfolk, Virginia. In 2007, he entered into a brokerage agreement with Atlantic Yacht Sales ("AYS"), a Delaware corporation with its only place of business in Annapolis, Maryland, as the exclusive agent for the sale of Olly's high-speed motorboat. The AYS employee with whom Olly dealt was Sammy Slick, a resident of Delaware.

Slick knew that Olly was in the market for a larger boat and told him about a 59-foot yacht named "First Draw" that AYS was under contract to sell for First Draw's owner. Slick told Olly he could get a "better deal" if he would do the following: Sell Slick Olly's motorboat "off-the-books" at a discount and then buy First Draw directly from its then owner, thereby avoiding AYS's substantial brokerage fees on both transactions. Olly agreed and consummated the transaction as proposed by Slick in early 2008.

In 2009, Olly decided to sell First Draw, which was berthed in Norfolk. He executed a new brokerage agreement with AYS, giving AYS the exclusive right to sell First Draw and stipulating that Slick would be the primary sales representative. In mid-2009, Slick took First Draw to Annapolis, where he allowed Howard Jones, a resident of New York, to view and inspect it.

In December 2009 in Norfolk, Slick presented Olly with a letter that Jones had sent him from New York offering to buy First Draw for \$850,000, "subject to the usual condition that the vessel first pass the customary luxury level yacht inspection prior to closing and delivery of the vessel, which shall take place in Norfolk, Virginia. The \$5,000 cost of the inspection to be advanced by Olly as seller and reimbursed by Jones as purchaser at closing." Olly accepted the offer by signing Jones' letter and returning it to Slick, who arranged for the inspection by a Norfolk-based inspector. Olly paid the \$5,000 inspection fee, and First Draw passed the inspection.

Just before the scheduled closing, Slick presented Olly in Norfolk with a letter from Jones revoking his offer to purchase First Draw. The letter was on AYS's letterhead and signed, "Howard Jones by Sammy Slick." In fact, in a telephone conversation between Jones in New York and Slick in Annapolis, Jones had authorized Slick to write, sign, and deliver the letter to Olly in Norfolk. Soon thereafter, Olly learned that, in January 2010, Jones had purchased a different yacht from AYS for \$1.2 million and that Slick had earned a substantial commission from that sale.

On February 1, 2010, Olly filed a complaint in the United States District Court for the Eastern District of Virginia (Norfolk Division) to recover \$850,000 for breach of the contract and for tortious interference with the contract for the sale of First Draw. The complaint named AYS, Slick, and Jones as defendants. When AYS learned of the "off-the-books" transactions between Slick and Olly, Slick abruptly moved on February 10 from Delaware to Virginia Beach, Virginia, where he established residency and began working for a yacht broker there. Slick was served with the summons and complaint at his new residence in Virginia Beach. AYS and Jones were soon thereafter properly served by certified mail at their places of business.

Slick's first response to the complaint was to file a motion to dismiss the case against him for lack of subject matter jurisdiction. At the same time, Jones filed a motion to dismiss for lack of personal jurisdiction, asserting truthfully that he had never set foot in Virginia and that he personally had never had any direct contact with anyone in Virginia regarding the purchase of First Draw. AYS answered the complaint and filed a counterclaim against Olly for \$65,000,

which was the amount of the brokerage fees AYS would have earned if Olly had not entered into the sham transaction with Slick in early 2008.

(a) How should the District Court rule on Slick's motion to dismiss for lack of subject matter jurisdiction? Explain fully.

Diversity subject matter jurisdiction is proper, and the motion should be denied.[28 USC §1332] There is no federal question, [28 USC §1331] so the only possible ground for federal court subject matter jurisdiction is diversity of citizenship. The time for assessing citizenship of the parties is the date the suit is filed. For this reason, Slick's subsequent move to Virginia does not affect the question of whether the jurisdictional threshold of greater than \$75,000 is met.

(b) How should the District Court rule on Jones' motion to dismiss for lack of personal jurisdiction? Explain fully.

Applicant should discuss whether the facts fit into any of the provisions in Virginia's Long Arm Statute [Va. Code §8.01-328.1 et seq.] and also if on these facts Jones could be constitutionally sued in Virginia. Due process requirements are met by this assertion of personal jurisdiction because Jones has many affiliating activities with the state of Virginia: the yacht is in Virginia, the inspection was arranged to take place in Virginia.

***The examiners agree to accept as a correct answer: that due process requirements are met because the cause of action arose from a contact in the state of Virginia (the letter revoking the contract was presented in Virginia).

Jones' motion to dismiss for want of personal jurisdiction should be denied. The Virginia Long Arm Statute governs, and that allows jurisdiction over an absent defendant who has acted through an agent in Virginia. Slick is Jones' agent when Slick presents the contract and then the letter reneging on the contract. This would have been transacting business under Va. Code §8.01-328 [1] and this provision has been construed as a single act requirement; it does not require a pattern of doing business in Virginia.

(c) On what basis, if any, might Olly move to dismiss AYS's counterclaim, and would he be likely to succeed? Explain fully.

AYS' counterclaim against Olly should be dismissed. This is a permissive counterclaim because it is unrelated to Olly's original claim. Though permitted, there must be an independent basis of federal subject matter jurisdiction to support a permissive counterclaim. Although there is diversity of citizenship between the parties, the amount in controversy in the counterclaim is not \$75,000 or greater. For this reason diversity is absent.

***The examiners agree to also award points for an argument that supplemental subject matter jurisdiction could be asserted, but it probably will not work because the counterclaim is not part of the same case or controversy as the plaintiff's original claim

5. [Ethics] Justin and Bree Scott, husband and wife, were injured when their automobile, driven by Justin, was struck by Daisy West's automobile as Justin attempted to exit and West attempted to merge onto Highway 81 in Botetourt County, Virginia. The Scotts retained Renard Hill, a Virginia attorney, to represent them both. Justin and Bree signed a contingency fee agreement in which they agreed to pay Hill one-third of any monetary recovery he obtained for them and to reimburse him for any costs he advanced on their behalf. In explaining the terms of his representation, Hill did not explain to the Scotts that Bree might have a cause of action against Justin if it were found that Justin had been negligent in causing the accident.

Hill filed two separate actions against West in the Circuit Court of Botetourt County alleging in each that West was negligent: *Justin Scott v. Daisy West* and *Bree Scott v. Daisy West*. The answers filed by West's attorneys denied negligence and, in response to Justin's case, asserted the affirmative defense that Justin was contributorily negligent by braking suddenly and changing lanes without signaling. Hill conducted thorough discovery and accumulated a substantial file of documents in the two cases. Hill had advanced \$2,500 for costs in each case.

Justin's case went to trial first, and the jury returned a defense verdict, finding that Justin had been contributorily negligent. This result angered the Scotts, who decided to fire Hill and retain another attorney to handle Bree's case. Bree demanded that Hill deliver to her the file and all the deposition transcripts, witness statements, interview notes, and medical records relating to her case so she could give these materials to her new attorney. Hill responded that he would

deliver the file and the accompanying materials as soon as Bree paid him \$9,000, which represented fees for the number of hours he had spent working on her case at his customary billing rate, plus the \$2,500 he had advanced as costs.

(a) Did Hill satisfy all ethical obligations to Bree at the time she retained him? Explain fully.

No. Under the Virginia Rules of Professional Conduct [VRPC], a lawyer is prohibited from representing a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest includes a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Here, with the husband being the driver of the vehicle that was hit by West, unless Hill knew it was pretty certain that the husband was not guilty of any negligence contributing to the crash, a concurrent conflict of interest existed. Even then, Hill should obtain from both clients a written waiver and confirmation that he'd advised both clients of the potential of a conflict and VRPC 1:7[a] & [b]. VRPC 1:4[b] requires an attorney to explain a matter to a client to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.

(b) If Bree had wanted to amend her action to name Justin as a defendant, under what circumstances, if any, could Hill have continued to represent Bree? Explain fully.

He can not do it. Under VRPC 1:7(b)(3), even if Bree & the Husband consent, Hill's concurrent conflict of interest can not be waived or consented to by the clients.

(c) May Hill ethically withhold from Bree the file and records she has requested until she has paid him as demanded? Explain fully.

No. Under VRPC 1:16(d)&(e), the attorney is prohibited from withholding copies of the described documents until the attorney's fee had been paid.

(d) What steps could Hill have taken to preserve his claim to any fees and costs due him from an ultimate monetary recovery obtained by Bree's new attorney, and would Hill be entitled to recover any fees and costs in these circumstances? Explain fully.

Hill should give the new attorney notice of his claim for attorney fees. In *Heinzman v. Fine, Fine, Legum & Fine* 217 Va. 958 [1977], the SCV held that while a client for any reason and at any time discharge the client's attorney, the attorney who is discharged without just cause may recover the reasonable value of his services rendered based on a *quantum meruit* theory. The case did not decide and the BBE indicated it know of no case on the question of whether an attorney who is discharged for cause is entitle to recover any portion of the fee and presumably, this question would be determined under contract law.

6. [Va. Civil Procedure] Sam and Jane were divorced in 2003 by decree of the Circuit Court of the City of Norfolk, Virginia. The final divorce decree incorporated a Stipulation and Property Settlement Agreement. The Agreement provided that Sam would pay the reasonable college expenses of their son, Tom, who was 15 years old when the Agreement was executed.

The Property Settlement Agreement also contained the following provision:

"The parties agree that any dispute of any nature concerning any issue arising from the provisions of this Agreement shall be resolved by binding arbitration according to the rules of the American Arbitration Association."

After graduating from high school, Tom enrolled in college. During his first semester Tom spent more time socializing than studying. As a result, his grades were well below average, and he was put on academic probation. Sam decided that there was no reason to spend any more money on Tom's college education until Tom "grew up," and Sam told Jane he would suspend paying any of Tom's college expenses until Tom proved that he was serious about his education.

Jane disagreed and continued to pay for Tom's college expenses from her own funds. After incurring \$35,000 in tuition and other college expenses, Jane filed suit against Sam in the Circuit Court of the City of Norfolk for breach of contract to recover these expenditures.

In response, Sam filed a motion to compel arbitration based on the arbitration provision in the Property Settlement Agreement. Jane opposed the motion on the ground that the arbitration provision did not apply because her suit was merely an action to recover money. The Circuit Court judge granted Sam's motion and ordered the parties to arbitrate the dispute.

The American Arbitration Association then appointed a neutral arbitrator. Sam and Jane mutually submitted the following issue to the arbitrator: "Does the Property Settlement Agreement obligate Sam to pay for Tom's college expenses despite Tom's poor academic performance, and should Sam reimburse Jane for the expenses she incurred?"

After a full evidentiary hearing, the arbitrator ruled in favor of Jane, holding that, "Sam shall forthwith reimburse Jane for the \$35,000 she expended, plus interest, and Sam shall continue to pay all reasonable expenses for Tom's college education."

Sam refuses to comply with the arbitrator's award and wants the Circuit Court to vacate it. Jane wants to enforce the award.

(a) Did the Circuit Court judge rule properly on Sam's motion to compel arbitration? Explain fully.

Yes. Under Va. Code §8.01-581.01, a provision in a written contract to submit disputes to arbitration is enforceable and under §8.01-581.02 either party, on the other parties refusal to arbitrate, may make application to the court and the court shall order the parties to proceed with arbitration. The issue that formed the dispute fell under the arbitration clause in the property settlement agreement.

(b) Upon what grounds may a Circuit Court vacate an arbitrator's award, and would any of those grounds justify vacating the award in this case? Explain fully.

Under §8.01-581.010, there are limited circumstances in which the court may vacate an award. All of the instances are tied into some basic procedural unfairness. The application must be made within 90 days from delivery of a copy of the award to the applicant. The BBE did not, for full credit, require the applicant to provide the specifics of the grounds, but did require that the answer reflect an awareness that each of the grounds involved something that was unfair about the arbitration procedure that was followed. Just disagreeing with the decision is not grounds.

(c) What procedure must Jane employ to make the arbitration award enforceable at law if Sam continues to refuse to comply? Explain fully.

Under §8.01-581.09 and §8.01-581.012, the prevailing party after the award is made, makes application to the court to confirm the award and to enter a judgment in conformity with the award.

7. [Real Estate] Vendor owned two parcels of real property on Main Street in Salem, Virginia. Parcel One, on West Main Street, was improved with a two-story office building. Parcel Two, on East Main Street, was an unimproved lot. Vendor had purchased both parcels in 2007, and now listed both parcels for sale.

Regarding Parcel One, Vendor and Smith signed a contract on December 1, 2009 by which Smith agreed to buy Parcel One for \$250,000. The contract contained the following term: "Closing shall occur on February 1, 2010, at which time Vendor shall deliver the office building in its present condition and convey marketable title to Parcel One."

In preparation for the closing, Smith obtained a title insurance binder, which listed a lien in the amount of \$10,000 in favor of the company that had performed heating, ventilation, and air conditioning ("HVAC") repairs in 2006. Vendor firmly believes that the HVAC bill had been paid by the person from whom he bought Parcel One in 2007 and, therefore, that the lien had been satisfied. However, Vendor cannot produce proof that the HVAC lien had been paid, and no one else is available to verify payment of the lien.

In mid-December 2009, a snowstorm blanketed the area, and the snow accumulation on the roof of the office building on Parcel One reached 18 inches. The roof began to sag, and Vendor attempted to brace it. However, the bracing proved inadequate, and the interior suffered damage that would cost \$50,000 to repair.

As the date of closing approached, the damage to the building had not been repaired, and the HVAC lien

remained of record. Smith said he would not close the deal unless Vendor undertook the repairs at Vendor's expense and agreed to set aside in escrow \$10,000 from the sale proceeds to provide for payment of the lien if it could not otherwise be removed. Vendor refused both demands, insisting that he had no responsibility for repairing the damage because it had occurred after their contract had been signed and that the lien had been paid. Smith refused to close, and Vendor sued Smith for specific performance of the contract.

Thomas, who owns an apartment development adjacent to Parcel Two, told Vendor that he (Thomas) was interested in buying it and dedicating it as a neighborhood playground for young children. Vendor orally agreed to sell Parcel Two to Thomas for \$75,000. Over the next few weeks, Thomas, a self-promoter and city activist, released a widely publicized statement to the media touting his civic largesse and, with Vendor's knowledge, purchased some used playground equipment, refurbished it, and had it installed on Parcel Two, all at a cost to Thomas of \$15,000.

A few days before the scheduled closing, Vendor received an offer from a developer to buy Parcel Two for \$150,000. Vendor accepted the developer's offer and refused to close the deal with Thomas. Thomas thereupon sued Vendor for specific performance of their agreement. Vendor asserted the Statute of Frauds as a defense and offered to reimburse Thomas for all cost she incurred in connection with the playground equipment.

(a) Can Vendor prevail against Smith in his suit for specific performance of their agreement on Parcel One? Explain fully.

Vendor is unlikely to prevail for two reasons. First, Smith can argue that Vendor failed to present a marketable title. Unless a contract for sale of realty expresses a contrary intent, a seller is under an implied duty to present marketable title at closing. Here, moreover, the parties' contract specifically required Vendor to furnish marketable title. To be marketable, title need not be perfect, but must be free of all reasonable doubts or risk of attack. Though there is no apparent question of Vendor's fee simple title to Parcel One, an encumbrance such as a mechanic's lien will make title unmarketable unless the buyer contracted to accept it or its assertion is so unlikely as to make the concern *de minimis*. In this case, Smith clearly did not contract to accept the encumbrance; and assertion of the lien, while not certain, is not so unlikely as to be considered *de minimis*.

Second, damage caused by the storm would fall, under the terms of the contract, on Vendor. Though the doctrine of equitable conversion applies in Virginia and would ordinarily place the risk of loss on Smith, Vendor's contractual covenant to deliver the building "in its present condition" precluded application of that doctrine and placed the risk of loss on Vendor.

(b) What is the likely outcome of Thomas' suit against Vendor for specific performance of their agreement on Parcel Two? Explain fully.

Under the Statute of Frauds, a contract to transfer an interest in land must generally be in writing, signed by the party to be charged. Here, the agreement was not in writing. However, an exception to the Statute of Frauds applies in the case of part performance. Part performance in the transfer of realty requires: (1) a parol agreement definite in its terms; (2) acts in reference to, and resulting from, the alleged agreement, including taking of possession and/or making improvements; and (3) that the agreement have been so far performed as to make a refusal to fully execute the agreement a fraud upon the party performing. In this case, Thomas and Vendor had an oral agreement for the purchase of Parcel Two for a stipulated price. Thomas' public statements and considerable expenditure (\$15,000) in reliance on that agreement represented a significant change of position on Thomas' part, but it is unclear whether Vendor's offer to make him whole would be sufficient to overcome Thomas' claim. The Board suggested that the answer could go either way, and full credit would be given for either conclusion as long as applicants recognized the issue and discussed the rules.

8. [Equity & Va. Civil Procedure] Roy and Jake, long-time neighbors, owned adjoining parcels of land in Bee, Virginia, which is an area of scenic, pastoral beauty. For many years, they had lived next door to each other in houses close to their common property line. After a number of increasingly contentious disagreements between them, Jake decided to move and built a new house at the far end of his property, at the top of a hill some 2200 feet away from Roy's home.

Roy, on the premise that he wanted to be sure that Jake would not be "spying" on him from his new hilltop home, constructed a 15-foot-high tripod on which he mounted floodlights, a wireless camera, and motion sensors. The motion sensors activated floodlights and wireless camera after dark whenever there was any movement around Jake's house.

The floodlights became a source of great annoyance to Jake, often waking him from sleep. The floodlights would unexpectedly light up the entire area surrounding his home late at night at the slightest movement of any stray animal or trees swaying in the wind. Also, Jake objected to the wireless camera's tracking his every move on his own property and the fact that the wireless transmissions emanating from the camera interfered with the television reception from the TV dish mounted on Jake's roof.

Jake's lawyer wrote and delivered a letter describing the effect on Jake and his property and requesting that Roy either disable the floodlights and camera or redirect them so that they did not point in Jake's direction. Roy simply ignored the letter.

Jake's lawyer then sent another letter informing Roy that Jake intended to build a fence just inside Jake's side of the common property line tall enough to block the lights and the line-of sight of Roy's wireless camera. Roy ignored this letter as well, so Jake built the fence.

The fence was about 30 feet high, constructed of 25 utility poles about 10 feet apart, with plastic wrap and canvas hung between the poles. It was unsightly, but it served the intended purpose – it blocked the floodlights and camera. It also blocked the afternoon sun on Roy's side of the property line and kept Roy's vegetable garden from getting the amount of sun it needed. The fence, as it stands, probably reduces the value of both Roy's and Jake's property slightly and mars somewhat the pastoral nature of their respective properties, but Jake finds it worth the cost.

Roy now wants to sue Jake in Circuit Court to have the fence removed, while at the same time keeping the floodlights and camera in place.

(a) On what theory might Roy base his lawsuit, what remedy should he seek, and is it likely that the facts will support each of the elements necessary to state a *prima facie* case? Explain fully.

Roy's claim could be based on the theory of private nuisance, which requires an action that unreasonably interferes with the use and enjoyment of plaintiff's land in a way unique to the plaintiff. Here, the fence was unsightly, reduced the value of Roy's property, and interfered with Roy's efforts to maintain a vegetable garden on his side of the property line. The remedy the Board expected applicants to discuss was a permanent injunction requiring Jake to dismantle the fence. To obtain injunctive relief, Roy would not only have to prove the existence of a nuisance, but also the inadequacy of a remedy at law, which he should be able to do.

(b) What defense might Jake reasonably assert against Roy's claim, and what is the likelihood that such a defense will succeed? Explain fully.

Presuming that the relief sought by Roy was equitable in nature (*i.e.*, injunctive relief), the appropriate defense would be "unclean hands." Under the unclean hands doctrine, a party seeking equitable relief must himself not have been guilty of inequitable or wrongful conduct. In this case, the erection of Jake's fence was prompted by the installation of floodlights by Roy that substantially interfered with Jake's use and enjoyment of his own home. A defense of unclean hands under the facts of this case should succeed. See *Cline v. Berg*, 273 Va. 142, 639 S.E.2d 231 (2007) & *Richards, Admin. v. Musselman*, Exec. 221 Va. 181 [1980].

(c) To what court may the losing party in Roy's suit appeal once the Circuit Court makes its final judgment?

The appeal would be to the Supreme Court of Virginia since it is a civil case, other than one involving domestic relations. The subject of the case is not within the specific areas handled by the Court of Appeals of Virginia. Appellate jurisdiction for all other cases is in the Supreme Court.

9. [Local Government] Peter Pane was injured when he was struck by a City snow plow while he was walking within a designated cross-walk on King Street in the City of Alexandria, Virginia in December 2009. At the time of the incident, a light snow was falling, and the City employee who was driving the snow plow and clearing away the snow was exceeding the posted speed limit by at least ten miles per hour. The City employee was admittedly in a hurry because he wanted to return the snow plow to the City's vehicular maintenance facility before closing time in order to have the plow's brakes checked. In his remarks to the investigating police officer at the scene of the incident, the City employee described the snow plow's brakes as feeling "somewhat squishy" and as making a whining noise when applied.

Peter suffered a broken arm and a broken leg as a result of the collision, and he missed about 4 weeks of work.

Although Peter is a resident of the City of Alexandria, he is a lawyer who is employed by a federal government agency, the offices for which are located in the District of Columbia. Having heard about the statements of the snow plow driver, and before initiating any litigation regarding the collision, on February 15, 2010 Peter sent by U.S. mail a letter, addressed to the Mayor and members of the City Council of Alexandria, demanding the opportunity to review "all documents (including any e-mails) pertaining to safety inspections, maintenance and repairs of the City's snow plows for the time period January 1, 2006 to the present." Peter's letter made no reference to the collision and listed his residence address for the purpose of a reply. The letter was received by the Mayor and City Council on February 17, 2010.

On February 19, 2010, Peter filed a Complaint in the Circuit Court for the City of Alexandria, seeking an award of \$1 million dollars from the City of Alexandria as compensation for his personal injuries, pain and suffering, and loss of income resulting from the negligent operation of the snow plow by a City employee on the day of the collision and the City's improper maintenance of the snow plow.

The Mayor asks you the following questions and directs you to answer them in the order presented:

(a) What defenses can the City assert that its status as a City within the Commonwealth of Virginia protects it from liability to Peter? Explain fully.

- [i] Applicant should discuss local government immunity and that Cities have immunity for governmental functions, but not for proprietary functions. Snow removal is a governmental function and the City would have tort immunity.
- [ii] Peter failed to give the required notice to city attorney or chief executive or mayor under Va. Code §15.2-209, which notice should include the time and place at which the injury is alleged to have occurred and the notice must have been received by the proper person within six months of the incident.

(b) Is the City obligated to allow Peter to review the requested documents even though he has not initiated formal pretrial discovery in connection with his lawsuit? Explain fully.

Yes, under the Virginia Freedom of Information Act, Va. Code §2.2-3700 *et seq.*. The documents sought are public records and there is no requirement that an action be pending for the FOI act to apply.

(c) How, if at all, would your answer and analysis of subpart (a), above, differ if the term "County" or "County of Fairfax, Virginia" was substituted in each instance for "City" or "City of Alexandria, Virginia" and Peter's letter was addressed and sent to the chief executive of the County of Fairfax? Explain fully.

- [i] Counties have blanket immunity from tort claims and it does not matter whether the function is proprietary or governmental.
- [ii] The notice requirements of §15.2-209 now apply to claims against counties for harm caused by negligence to the same extent as the notice requirements apply to cities.